

EXHIBIT

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Declaration of Peter C. Salerno
In Support of Defendant Yassin Kadi's Motion
To Exclude the Testimony of Victor Comras

03 MDL 1570

July 31, 2023

Exhibit
1002

FLAWED DIPLOMACY



THE UNITED NATIONS & THE
WAR ON TERRORISM

VICTOR D. COMRAS

enforce and strengthen . . . the measures imposed under domestic laws or regulations against their nationals and other individuals or entities operating in their territory, to prevent and punish violations.” The resolution also pressed once again for full compliance with the committee’s reporting requirements. Reports were to be expanded to include “all steps taken to implement the measures . . . and all related investigations and enforcement actions, including a comprehensive summary of frozen assets of listed individuals and entities within the Member State territories.”

While several additional countries provided compliance reports to the committee, few contained useful information on what was actually being done to quell the terrorists. The committee continued to complain that it was “running blind” on matters of country implementation of the required measures. Finally, in July 2008, the Security Council directed the committee to take firmer action, including replicating the approach that had been taken by the disbanded monitoring group to explore and report to the Security Council on specific country failings or lack of compliance.

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The committee’s primary task in managing an effective sanctions regime against al Qaeda and the Taliban involves maintaining a comprehensive and updated Consolidated List of key members and associates of al Qaeda and the Taliban. But this process proved daunting from the start. Despite being charged with administering the Consolidated List, the committee has no authority to place names on the list without being requested to do so by a member state. Unfortunately, few countries have been willing to present names to the committee for designation. Most remain reluctant to present information to the committee concerning their own nationals or those within their midst. This has placed the primary burden of proposing designations on the United States, with only a few other countries chiming in from time to time.²⁴ The United States, for its part, has drawn heavily from its own domestic list of global terrorists and terrorist organizations. A request to permit the independent Monitoring Group to propose names was turned down.²⁵

Additions to the Consolidated List require unanimous committee approval. The member country proposing the designation is supposed to provide sufficient evidentiary information to establish membership in al Qaeda or the Taliban, or to otherwise demonstrate that the proposed individual or entity is “associated with” al Qaeda or the Taliban. While the country proposing the designation and the country where the designated individual resides are encouraged to inform the parties con-

cerned of the measures imposed against them, this has not become a regular practice.

Early versions of the Consolidated List included only rudimentary information concerning al Qaeda leaders and financiers. The information was often outdated, and the United States, sometimes in conjunction with other Member States, sometimes without much ado. However, over time, the committee has received more substantive justifications for each addition, which has significantly slowed down the list’s growth. A few new names per quarter. A substantial number of individuals, and groups now contributing financial support, are still not on the list.

Over time the list has also fallen short. Many al Qaeda and Taliban leaders have been removed. And little has been done to update the list. One complaint regularly heard is that the list is out of date. Names are quite common and there is no adequate basis for freezing assets. The list has been hard over the past several years. It is heavily dependent on member countries. Many countries have done so.

By the end of 2002, the Consolidated List contained 152 Taliban members and 80 al Qaeda members. The committee had also designated 91 organizations. By the end of 2010, the list included 137 Taliban members, or material supporters of al Qaeda. The list also included 137 Taliban members, or material supporters of al Qaeda. The list also included 137 Taliban members, or material supporters of al Qaeda.

One of the earliest issues to arise was the “association” of al Qaeda. Some governments initially refused to squelch their own local insurgents, providing names that had nothing to do with al Qaeda. The problem was partially resolved by Security Council Resolution 1617, which specified that

acts or activities indicating that an individual is “associated with” Al-Qaeda, Usama b

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measures imposed under domestic laws or regulations on individuals or entities operating in their territories. The resolution also pressed once again for reporting requirements. Reports were to be submitted to implement the measures . . . and all related measures, including a comprehensive summary of the entities within the Member State territories that have provided compliance reports to the committee. The committee complained that it was "running blind" in the absence of the required measures. Finally, in July 2002, the committee took firmer action, including the suspension of the disbanded monitoring group that had been set up on specific country failings or lack of

managing an effective sanctions regime. The committee has been maintaining a comprehensive and up-to-date list of members and associates of al Qaeda and the Taliban from the start. Despite being charged with the task, the committee has no authority to place names on the list by a member state. Unfortunately, few member states have provided names to the committee for designation. The committee has received information to the committee concerning the list. This has placed the primary burden of identifying members and associates on member states, with only a few other countries chiming in. The United States, for its part, has drawn heavily from the list of members and terrorist organizations. A request to the committee to propose names was turned down.²⁵

The committee requires unanimous committee approval for designation. Designation is supposed to provide sufficient evidence of membership in al Qaeda or the Taliban, or to provide evidence that an individual or entity is "associated with" al Qaeda. The committee encourages proposing the designation and the country of origin are encouraged to inform the parties con-

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cerned of the measures imposed against them, this is still left to national discretion and has not become a regular practice.

Early versions of the Consolidated List were put together with haste and included only rudimentary information covering the most well-known Taliban and al Qaeda leaders and financiers. The initial batch proposed for designation by the United States, sometimes in conjunction with other member countries, was accepted without much ado. However, over time, committee members began to demand more substantive justifications for each listing. This, and other factors discussed below, significantly slowed down the listing process, which by 2006 had fallen to only a few new names per quarter. A substantial number of al Qaeda and Taliban leaders, and groups now contributing financially or otherwise to their terrorist efforts, are still not on the list.

Over time the list has also fallen seriously out of date. Several of the listed al Qaeda and Taliban leaders have been captured or killed. Others have been replaced. And little has been done to update accompanying identification information for those listed. One complaint regularly heard about the list is that many of the names are quite common and there is insufficient identification specificity to provide an adequate basis for freezing assets or to inhibit travel.²⁶ The committee has worked hard over the past several years to address these problems, but it remains heavily dependent on member countries themselves to flesh out such identification details, and few countries have done so.²⁷

By the end of 2002, the Consolidated List maintained by the 1267 Committee contained 152 Taliban members and 80 members or associates of al Qaeda. The committee had also designated 91 organizations and other entities. At last count, in June 2010, the list included 137 Taliban members and some 257 members, associates, or material supporters of al Qaeda. It also included 103 named entities believed to be associated with al Qaeda. Many of these entities, however, represent different branches, or different appellations of the same organizations.²⁸

One of the earliest issues to arise was defining what constituted "association with al Qaeda." Some governments initially viewed the Consolidated List as an opportunity to squelch their own local insurgencies, or to otherwise taint opposition groups, providing names that had nothing to do with either the Taliban or al Qaeda. This problem was partially resolved by the Security Council in 2005 with Resolution 1617, which specified that

acts or activities indicating that an individual, group, undertaking, or entity is "associated with" Al-Qaeda, Usama bin Ladin or the Taliban include:

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at more deliberative process in review. The process also establishes a new ombudsperson mailbox process.⁵⁰ This ombudsperson gathers information from petitioners and the monitoring team and country representatives authorized to prepare a report to the Al Qaeda committee summarizing this information as well as the process, while an improvement over the current process, is well short of the due process guarantee.

The implementation of Resolution 1904 provided a new process. Under the first, the person requesting delisting, if espousing the delisting claim before the committee, could address an appeal to the committee. The committee, within the United Nations Secretariat, has responsibility for reviewing and advising on the request to the appropriate country. If, after these consultations, any of the member countries would forward such recommendations directly to the chair of the Al Qaeda committee, the justification for delisting. The committee would then consider the request, which would be considered denied unless a majority of members, within three months in favor of the requested delisting, was reached. Under this system, was not advocated for the flow of relevant material to the committee.

Resolution 1904 procedures all requests for delisting to the Ombudsperson.⁵³ Such submissions are sent to the Ombudsperson and other relevant countries, as well as the committee, request that it provide any information. The Ombudsperson within two months of the request to the Ombudsperson and the petitioner seeking delisting. If the Ombudsperson has sufficient information in hand, the Ombudsperson would prepare a report. The report would be placed on the committee's receipt. After discussion, the committee would then vote to approve the delisting petition. Approval would require a majority of committee members.

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It remains to be seen just what effect the committee's new delisting process will have on the Al Kadi case and other challenges to the designation process. The way in courts in Europe and elsewhere. If the views of Maduro are upheld, the procedural reforms contained in Resolution 1904 will likely prove inadequate. This would necessitate further Security Council action to preserve the utility of the al Qaeda and Taliban designations. Any such further reforms would have to take into consideration the importance of impeding terrorist mobility and funding; the sensitivities of intelligence gathering, which is essential to the designation process; the right of those designated to be heard in their defense; and the need for independent oversight to guard against abuse. Finding a way to fulfill all of these requirements will be an accomplishment indeed.

In any case, special care must be given to ensuring that adequate information is presented to justify designation. While only a very few individuals have been erroneously or mistakenly designated (and they have since been delisted), the absence of transparency, and of independent or third-party review procedures, has cast doubts concerning the legitimacy of the designation process. Perhaps the American experience can serve as a model in this respect.

The United States maintains several different lists of designated individuals and entities that are administered in conjunction with various U.S. sanctions programs. Designations are made pursuant to specific powers granted by Congress to the president, who, in turn, has delegated them to various members of his cabinet. The process is considered as an executive administrative action, and is subject to both administrative and judicial review and restraints. The standard for judicial review in such cases relates to whether the action is based on "reasonable cause." This standard may not rise to the high standard required for criminal convictions, but it ensures that designations are not imposed in an arbitrary or capricious manner. Likewise, UN guidelines should also ensure that there is sufficient information present, and shared with member countries, to demonstrate at least a sufficient "reason to believe" that those designated fall within the Security Council resolution's purview as members or associates of al Qaeda and the Taliban.

Renewed confidence in the al Qaeda committee procedures could only result in a win-win situation for all. Such renewed regard for the list would certainly help reinforce its utility and effectiveness as a tool against terrorism and terrorism financing.

While the criticality of the Consolidated List to the applications of sanctions against al Qaeda and the Taliban cannot be understated, the real test of the mea-

to Target Terrorism," U.S. Department of

olution 1390 and the work of the 1267 Monitoring Group is described in chapter 5.

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of economic sanctions on the enjoyment of economic and Social Council, UN Doc. E

own as the Al Qaeda and Taliban Sanctions (Argentina), Alfonso Valdivieso (Colombia), (Argentina), Johan Verbeke (Belgium), Jar. (Austria).

UN Security Council Resolution 1363, and directed to the group to monitor pursuant to resolutions 1267 and 1333, listing a short list of aircraft identified as Security Council Committee Established regarding Afghanistan."

the Security Council in Resolution 1333, the Afghanistan border was only approved a

by Resolution 1267 (1999) Concerning its release, AFG/131, UN Doc. SC/7028.

is the son of Jalaluddin Haqqani, former leader and son are believed to remain active in the areas of northwestern Pakistan. The committee to specifically include on its list the members of the Al-Qaeda organization and the individuals and entities associated with them." UN Security Council Resolution 1390

own that it is very difficult for the Security Council, a highly politicized forum, to take any action in rare instances in which a country has policies. Several experts have pointed out that Security Council measures can only be carried out if they are insulated from such political and diplomatic

in chapter 6. *Global Hubris: Why the West is Losing the War* (2004), 63.

15. A memorandum prepared by the Congressional Research Service in 2004 indicates that between September 11, 2001, and March 31, 2004 at least ten major terrorist attacks were carried out by groups linked to al Qaeda, <http://www.fas.org/irp/crs/033104.pdf>.
16. The specially equipped airliner was able to take emergency avoidance action.
17. See Security Council resolutions 1438 (2002), 1440 (2002), 1450 (2002), and 1516 (2003). Syria was the only Security Council member to vote against Resolution 1450, which involved condemnation of an attack in Kenya against Israeli interests. See also statement by the president of the Security Council, UN Doc. S/PRST/2003/13, August 20, 2003.
18. For a general description of terrorist activities since September 11, 2001, see Department of State, *Global Patterns of Terrorism, 2001–2003*, and Department of State, *Country Reports on Terrorism, 2004–2008*.
19. Several accounts indicate that the attack actually involved two separate teams. The first team reportedly had entered the school the night before and emerged from hiding after the second team had encircled the school. See S. Banovac, et al., "Anatomy of a Terrorist Attack: Terror at Beslan," Ridgeway Center Paper 15 (2007), <http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=50175>.
20. For a detailed account of what actually transpired during these two days, see C. J. Chivers, "The School," *Esquire*, March 14, 2007, http://www.esquire.com/features/ESQ0606BESLAN_140.
21. See "Russian security officials say 10 of Beslan school raiders identified," Associated Press, September 9, 2004, http://findarticles.com/p/articles/mi_qn4188/is_20040909/ai_n11472902. The impact of the Beslan massacre on UN actions against terrorism is explored further in chapter 6 with regard to the work of the Security Council's CTC.
22. Security Council Verbatim Record, UN Doc. SPV/4892 (2004).
23. UN Security Council Resolution 1455 (2003).
24. The United States was a listing requestor in almost 80 percent of the names on the UN Consolidated List.
25. The Monitoring Group requested such authority in its report to the Security Council dated December 2, 2003. See para. 197 of the second report of the Monitoring Group established pursuant to Resolution 1363 (2001) and extended by Resolution 1390 (2002), UN Doc. S/2003/1070.
26. In its first report to the Security Council, dated May 15, 2002, the Monitoring Group noted widespread dissatisfaction with the designation process and the Consolidated List. This included complaints with regard to inaccuracies and the insufficiency of identifying information contained in the list, as well as concerns with the methodology used in putting the list together. Of particular concern was the lack of transparency and information sharing to bolster the rationale for such listing.
27. UN Security Council Resolution 1822 (2008) directed that the al Qaeda committee undertake a comprehensive review of all names on the Consolidated List with a view to updated information on the list. This work was to be completed by June 30, 2010. The agreed procedures call upon the designating states and the states of residence and nationality to assist in this process.
28. Briefing by H. E. Mr. Thomas Mayr-Harting, Chairman of the Security Council Committee established pursuant to Resolution 1267 (1999) concerning al Qaeda and the Taliban and Associated Individuals and Entities, to the Security Council on November 13, 2009 (as published on the 1267 Committee's official website).
29. UN Security Council Resolution 1617 (2005).
30. Ibid.
31. Comras, "UN Terrorist Designation System Needs Reform," *Perspectives on Terrorism* 2, no. 10, http://www.terrorismanalysts.com/pt/index.php?option=com_rokzine&view=article&id=62.